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IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

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Nos. ~~962-963~~.

FIRST NATIONAL BANK OF CINCINNATI and INTERNATIONAL HEATER COMPANY,

Petitioners,

against

RUDOLPH B. FLERSHEM, CHARLES O. CORNELL, JOHN H. WATERS and FRANK B. CAHN, as the Reorganization Committee constituted under the Plan and Agreement dated February 11, 1931, for the Reorganization of NATIONAL RADIATOR CORPORATION and BANKERS TRUST COMPANY, Trustee, NATIONAL RADIATOR CORPORATION (Delaware), NATIONAL RADIATOR CORPORATION (Maryland), ROBERT S. WATERS and WILLIAM G. HEINER, Receivers, CARL E. RESLEY and G. FRANKLIN LUDINGTON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF ON BEHALF OF RESPONDENTS RUDOLPH B. FLERSHEM, CHARLES O. CORNELL, JOHN H. WATERS AND FRANK B. CAHN, as the Reorganization Committee constituted under the Plan and Agreement dated February 11, 1931, for the Reorganization of National Radiator Corporation.

LAWRENCE BENNETT,
MAYNARD TEALL,
G. FRANKLIN LUDINGTON,
Counsel for the Respondents.

INDEX.

	PAGE
OPINIONS OF THE COURTS BELOW	1
JURISDICTION OF THIS COURT	2
INTRODUCTORY STATEMENT	2
ARGUMENT	3
FIRST: NO NOVEL OR IMPORTANT QUESTION IS PRESENTED BY THE PETITIONERS	3
SECOND: THE PETITIONERS ATTEMPT TO RAISE FOR THE THIRD TIME, UNDER THE GUISE OF QUESTIONS OF LAW, ISSUES OF FACT TWICE DISPOSED OF ADVERSELY TO THEM BY THE COURTS BELOW	5
I: THERE HAS BEEN NO DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF LEGAL PROCEDURE FOLLOWED IN CASES OF FEDERAL EQUITY RECEIVERSHIP	11
II: THE REORGANIZATION PLAN IS FAIR AND EQUITABLE	15
III: THE DISTRICT COURT HAD JURISDICTION TO EXECUTE THE DECREE OF SALE AND TO CONFIRM THE SALE HAD THEREUNDER	19
CONCLUSION	21

Table of Cases Cited.

	PAGE
American Baptist Home Mission Society v. *Barnett* (C. C. A. 2nd Cir., 1928), 26 Fed. (2d) 350; certiorari denied (1928) 278 U. S. 626	10
Charleston Mining Co. v. *United States* (1927), 273 U. S. 220	8
Davis v. *Mercantile Trust Co.* (1894), 152 U. S. 590	10, 20
Doran v. *Charles D. Kaier Co., Inc.* (C. C. A. 3rd Cir., 1932), 60 Fed. (2d) 259	10
Duncan v. *Atlantic M. & O. Ry. Co.* (E. D. Va., 1880), 88 Fed. 840	20
Fearon v. *Bankers Trust Co.* (C. C. A. 3rd Cir., 1916), 238 Fed. 83	7
First National Bank v. *Shedd* (1887), 121 U. S. 74	6
Gay v. *Hudson River Electric Power Co.* (N. D. N. Y., 1911), 190 Fed. 812	20
Graffam v. *Burgess* (1886), 117 U. S. 180	8
Guaranty Trust Co. v. *Chicago M. & St. P. Ry. Co.* (N. D. Ill. E. D., 1926), 15 Fed. (2d) 434	7
Harkin v. *Brundage* (1928), 276 U. S. 36	4
Hartford Accident Co. v. *Bunn* (1932), 285 U. S. 169	10
Hollins v. *Brierfield Coal & Iron Co.* (1893), 150 U. S. 371	6
Hovey v. *McDonald* (1883), 109 U. S. 150	20
Kansas City Terminal Ry. Co. v. *Central Union Trust Co.* (1926), 271 U. S. 445, at 453	18
Lesamis v. *Greenberg* (C. C. A. 9th Cir., 1915), 225 Fed. 449	20

PAGE

Louisville Trust Co. v. *Louisville, etc., Ry. Co.* (1899), 174 U. S. 674, at 682, 683 ..... 18, 19

Luhrig Collieries Co. v. *Interstate Coal & Dock Co.* (S. D. N. Y., 1922), 281 Fed. 265 3

Mellon, Director General, v. *L. E. McKinley* (1927), 275 U. S. 492 9

Metropolitan Railway Receivership (1908), 208 U. S. 90 6

Michigan v. *Michigan Trust Co., Receiver* (1932), 286 U. S. 334, at 345 4

Muller v. *Dows* (1876), 94 U. S. 444 6

Northern Pacific Ry. Co. v. *Boyd* (1913), 228 U. S. 482, at 508 18

Provident Life & Trust Co. v. *Camden & T. Ry. Co.* (C. C. A. 3rd Cir., 1910), 177 Fed. 854 9

Shapiro v. *Wilgus* (1932), 287 U. S. 348, at 356 5

United States v. *Butterworth-Judson Corp.* (1926), 269 U. S. 504, at 513 7

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Opinions of the Courts Below.

The opinion of the Circuit Court of Appeals for the Third Circuit is not yet reported, but printed copies have

been filed with the Record. The opinions of the District Court are not yet reported, but appear at pages 416 and 691 of the Record.

Jurisdiction.

The jurisdiction of this Court rests on § 240a of the Judicial Code as amended by Act of February 13, 1925, c. 229, § 1, 43 Stat. 938 (28 U. S. C. A. § 347a).

Introductory Statement.

The present petition is one of three applications by holders of approximately 2% in aggregate of the total outstanding indebtedness of National Radiator Corporation for a writ of certiorari to review a decision of the United States Circuit Court of Appeals for the Third Circuit filed March 24, 1933, affirming a final decree of sale and the decree confirming the sale of the property of the debtor corporation, in a suit instituted in the United States District Court for the Western District of Pensylvania by the respondents as holders, under a Reorganization Plan, of more than 95% of the total outstanding indebtedness of said corporation. The two other applications are entitled, respectively, "Amy Arzt and Josephine Ramsey, Petitioners, against Rudolph B. Flershem, et al., as the Reorganization Committee, etc., and others, Respondents," at No. 964, and "Lily Clapier, Petitioner, against Rudolph B. Flershem, et al., as the Reorganization Committee, etc., and National Radiator Corporation, Respondents," at No. 965.

ARGUMENT.

FIRST: No novel or important question is presented by the petitioners.

This suit is the usual equity receivership proceeding, instituted by a general creditors' bill (as an evolution out of the judgment creditor's bill to supplement the writ of execution) for a sale of the corporate debtor's property.

> *Luhrig Collieries Co.* v. *Interstate Coal & Dock Co.* (S. D. N. Y., 1922), 281 Fed. 265.

In the fall of 1930 it was apparent to those acquainted with the debtor's business that without marked improvement in business conditions, financial collapse was imminent (R. 49-50). In February 1931, after default actually occurred in the payment of interest on the debtor's outstanding Debentures, the Reorganization Committee was formed (R. 54) and later promulgated the Reorganization Plan (R. 55), under which were deposited more than 95% of such Debentures and substantial amounts of the preferred and common stock of the debtor corporation (R. 516). In October 1931 receivership occurred, followed by a sale of the debtor's property in August 1932, to purchasers on behalf of the Reorganization Plan, after the usual and orderly procedure in this regard prescribed by practice and the governing statutes.

In seeking a review of this proceeding, the petitioners aver none of the reasons stated in Paragraph 5 of Rule 38 of this Court. There is absent any conflict of decisions or any variance from established practice; no novel question is raised. Nor is this suit characterized by any of the

elements which prompted Mr. Justice Taft's remarks in the decision of *Harkin* v. *Brundage* (1928), 276 U. S. 36. There is no conflict of jurisdiction; the only question presented by the petitioners is whether jurisdiction has been fairly and equitably exercised. The propriety of the receivership itself has been recognized (R. 155-200). The Record shows the debtor's assets to be presently insufficient to pay even a quarter of its outstanding debt (R. 439, 698). Its $10,673,000 of Debentures have been matured (R. 432). Interest and sinking fund charges overdue and unpaid on those Debentures amount to more than $2,600,000 (R. 35). In this case there is the antithesis of the abuses censured by Mr. Justice Cardozo in his opinion in *Michigan* v. *Michigan Trust Co., Receiver* (1932), 286 U. S. 334, at 345. Here, *bona fide* creditors have instituted suit and not to hold creditors at bay, but as creditors to enforce their claims against their debtor; not to conserve for the debtor, but to seize and sell in satisfaction of their claims, the debtor's assets; not to continue a tottering business, but, in the only practical way possible under prevailing economic conditions, to realize upon their debtor's business, which remains of importance in the radiator industry, but is unable under prevailing economic conditions to meet its overwhelming fixed charges (R. 50, 164, 209). The very decrees which the petitioners attack cut off effectively every interest of the debtor in that business and transfer its assets to the creditors. This is precisely the type of equity proceeding which had Mr. Justice Cardozo's approval when he said:

> "It is one thing for a creditor with claims against a corporation that is legitimately his debtor to invoke the aid of equity to conserve the common fund for the benefit of himself and of the creditors at

> large. *Hollins* v. *Brierfield Coal & Iron Co.*, 150 U. S. 371, 380. Whatever hindrance and delay of suitors is involved in such a remedy may then be incidental and subsidiary." *Shapiro* v. *Wilgus* (1932), 287 U. S. 348, at 356.

The only delay and hindrance to creditors existing today in this suit is occasioned by the few who are petitioning this Court. Delay of more than two years in effectuating a reorganization has already done incalculable harm to the great majority of creditors. Further delay may deprive them now of what salvage through reorganization they may have. If the present Plan fails, they have no plan.

SECOND: The petitioners attempt to raise for the third time, under the guise of questions of law, issues of fact twice disposed of adversely to them by the Courts below.

Throughout the lengthy course of the orderly proceeding had in the Courts below the petitioners had "their day in Court"—many days, in fact. Of the contentions then presented by the First National Bank of Cincinnati, as intervening defendant, the District Court said (R. 417):

> "It did not undertake to deny that the defendant company had lost in operation about $1,500,000 for each of the last three years preceding the filing of the bill of complaint, or that it was moving toward inevitable bankruptcy when the instant suit was instituted. The most tangible effort of the intervening defendant was put forth in an effort to have a large 'upset' price fixed by the Court in ordering a sale of the defendant company's properties. . . .
>
> "In our opinion, the evidence has disclosed no

> fraudulent collusion between the plaintiffs and defendants. It does show, we think, a very present need for reorganization of the Radiator Corporation, and the means suggested in the bill seem to us to furnish a reasonable chance to avoid further loss by creditors. The holders of a small proportion of the company's indebtedness do not agree with this opinion, and such creditors are entitled to consideration by the Court. This does not mean that we should overturn the plans of the great majority of the creditors to save some part of their claims unless those plans unfairly encroach upon the rights of the minority claimants. In the instant case we discern no such encroachment. All the creditors were given the opportunity to participate in the plan of the majority. The small minority did not want to participate in the reorganization plan of the majority. Under such circumstances the rights of the minority creditors seem plain. They are entitled to recover the amount of the indebtedness to them by judicial sale of the properties of the defendant, or, in event those properties are fairly sold for less than the total indebtedness of defendant, for that proportion of the net proceeds of the sale which their claims bear to the total indebtedness."

This opinion is in conformity with the unbroken line of decisions of this Court, which satisfactorily dispose of every question of law and of fact presented by this case.

Muller v. *Dows* (1876), 94 U. S. 444;
First National Bank v. *Shedd* (1887), 121 U. S. 74;
Hollins v. *Brierfield Coal & Iron Co.* (1893), 150 U. S. 371;
Re Metropolitan Railway Receivership (1908), 208 U. S. 90; and see

United States v. *Butterworth-Judson Corp.* (1926), 269 U. S. 504, at 513.

The upset price was ascertained in conformity with the principle stated in

Guaranty Trust Co. v. *Chicago M. & St. P. Ry. Co.* (N. D. Ill. E. D., 1926), 15 Fed. (2d) 434.

The sale itself is sustained by

Fearon v. *Bankers Trust Co.* (C. C. A. 3rd Cir., 1916), 238 Fed. 83.

But the petitioners contend that no plan of reorganization is fair which lacks their approbation, as the opinion of the Circuit Court of Appeals in the instant case points out:

> "The appellants, however, while declaring the plan of distribution unfair, are opposed to any plan because they say neither this one nor any other can hold out a promise of success. Therefore they insist upon immediate and complete liquidation of the corporation's assets. Notwithstanding the lack of purchasers and the probability of receiving nothing, they take the stand that they prefer, and in law have a right, to know and accept their fate now.
>
> "We are constrained to hold, however, that as against the rights of all other creditors they cannot in equity prevail.
>
> "In reaching this judgment we have brought into force no new principles of equity. We have simply applied to new facts old principles found in the zone in which the Boyd, Phipps, Luhrig Collieries, Pusey & Jones and Shapiro cases are landmarks."

But the petitioners further contend that the assets in the custody of the District Court constituted a "trust

fund". If this is not a matter of mere nominalism, the trust, if there were one, was a trust for the benefit of all creditors and the terms and conditions of such trust are to be found, not in any trust instrument, but in the well settled principles of equity. These principles have been strictly followed, and in following them the District Court has faithfully performed its trust. If now, to obscure these principles, the petitioners seek a review for the third time of the facts underlying this case, they must recognize the equally well settled rule that this Court will not disturb a finding of fact made by a District Court, in equity, concurred in by the Circuit Court of Appeals, except in case of clearest error.

Graffam v. *Burgess* (1886), 117 U. S. 180;
Charleston Mining Co. v. *United States* (1927), 273 U. S. 220.

All seven questions presented by the petitioners resolve themselves, upon analysis, into but four questions of fact:

(a) Has there been dereliction in the judicial administration of this receivership estate?
(b) Was there error in the entry of a decree of sale (instead of some decree requiring piecemeal liquidation)?
(c) Was the Court without authority to confirm the sale decreed?
(d) Is the Reorganization Plan unfair?

Of the Reasons For The Allowance of The Writ urged by the petitioners at page 13 of their petition, their (1) embraces their affirmation of questions (a) and (b); their (2) their affirmation of question (d); their (3) their affirma-

tion of question (c). As to every one, the Circuit Court of Appeals has held to the contrary. The very purpose of legislation restricting obligatory appellate jurisdiction was to make final the decisions of the Circuit Courts of Appeals, said Mr. Justice McReynolds in his testimony before a subcommittee of the Committee on the Judiciary of the United States Senate February 2, 1924,

> ". . . the theory being that after two trials in a Federal Court as of right (one in the District Court and one in the Circuit Court of Appeals) the matter should end, subject to a discretionary review in the Supreme Court for some superior reason."

This superior reason, the petitioners fail to disclose. If they seek to review findings of fact, however, this Court will not refuse a reference to the Record to correct by restatement certain inaccuracies and omissions of their petition and brief.

A. W. Mellon, Director General, v. *L. E. McKinley* (1927), 275 U. S. 492.

It may not be inappropriate at this point to call attention to the fact that the petitioners, who have intervened in this cause as parties defendant (R. 155-200), in taking their appeals from decrees of the District Court, failed to join in these appeals their co-defendant National Radiator Corporation or to obtain a severance. Motion was made to dismiss their appeals, therefore, in the Circuit Court of Appeals, on the ground that their appeals, in the absence of a summons and severance, were fatally defective, under the rule laid down in the following cases:

Provident Life & Trust Co. v. *Camden & T. Ry. Co.* (C. C. A. 3rd Cir., 1910), 177 Fed. 854;

American Baptist Home Mission Society v. *Barnett* (C. C. A. 2nd Cir., 1928), 26 Fed. (2d) 350; certiorari denied (1928) 278 U. S. 626;

Doran v. *Charles D. Kaier Co., Inc.* (C. C. A. 3rd Cir., 1932), 60 Fed. (2d) 259.

This is the well established rule of this Court.

Davis v. *Mercantile Trust Co.* (1894), 152 U. S. 590;

Hartford Accident Co. v. *Bunn* (1932), 285 U. S. 169.

In the latter case this Court, speaking by Mr. Justice McReynolds, said (quoting from a prior opinion of this Court, at page 181 of the Report):

> "It is well settled that all the parties against whom a judgment of this kind is entered must join in a writ of error, if any one of them takes out such writ; or else there must be a proper summons and severance, in order to allow of the prosecution of the writ by any less than the whole number of the defendants against whom the judgment is entered."

It thus transpires that the defendant National Radiator Corporation and its receivers were not made parties to the appeal in this cause and are not parties to the Record in the present application for a writ of certiorari. The Circuit Court of Appeals, in its decision of March 24, 1933, consolidated all appeals and in confirming all orders and decrees of the District Court did not expressly dispose of the pending motion to dismiss the petitioners' separate appeal. It is submitted, however, that under the authorities cited above the present application is necessarily

defective, in that the appeal in the Court below, sought to be reviewed here on certiorari, was itself fatally defective.

At the expense of unduly lengthening this Brief, the respondents Reorganization Committee pray leave to conclude with a discussion of certain errors and omissions of the petitioners' application and supplementing brief, so as to make clear the facts of this case as shown by the Record.

I. There has been no departure from the accepted and usual course of legal procedure followed in cases of federal equity receivership.

Although the Reorganization Plan was promulgated February 11, 1931, receivership was not sought and receivers were not appointed until October 9, 1931 (R. 95), and then only because certain plaintiffs acting for some of the parties to this cause had instituted in New York two actions and were threatening further actions to procure preferential payment of their coupons (R. 594). The potential number of such actions was large. Were the debtor to continue to pay interest, either voluntarily or by reason of judgments obtained against it, the day was not far distant when its business would be entirely without cash working capital and would remain for the majority of creditors a body of frozen assets, with all possibility of the salvage of any substantial sum therefrom entirely lost (R. 16).

The decree appointing receivers was of the usual type, authorizing the administration of the debtor's property and enjoining levies of execution thereagainst, but not enjoining suits (R. 98).

After their appointment the receivers filed their first report, accompanied by an inventory of 235 pages, listing in minutest detail the debtor's assets (R. 122). In January

1932, at the application of solicitors for the respondents (complainants below), in accordance with the accepted practice in the United States District Courts, a day was set for the final hearing on the bill and answer, the entry of a decree of sale of the debtor's property and the taking of testimony to fix an upset price (R. 673). This hearing was set for March 3, 1932, of which due notice was given to all parties of record (R. 670). Bankers Trust Company, as Trustee, had intervened January 9 (R. 141), the First National Bank of Cincinnati intervened March 3 (R. 155), and International Heater Company intervened March 31, 1932 (R. 200). At this hearing, throughout three days voluminous testimony was taken of the appraisal and liquidating values of the debtor's property (R. 206 et seq.) and of the market prices recorded during several years for the debtor's outstanding Debentures (R. 205). The decline in market price of the debtor's Debentures from 20 to 14 in the latter part of 1930 (R. 205) was both an evidence of its financial difficulties and a forecast of the inevitable conclusion, if the losses of around $1,250,000 or $1,300,000 a year (R. 209), which resulted from the marked decline since 1928 in residential building (R. 208), should continue. Both receivers were among the witnesses and, exercising their proper function, fully informed the Court as to the nature and value of the debtor's property which was in their custody. Better testimony or of witnesses better qualified could not have been offered. The uncontroverted testimony of these witnesses showed that liquidation under prevailing economic conditions would be costly, protracted and would yield probably very little for any creditors (R. 343). Counsel for the petitioners participating in this hearing offered only his unsupported

opinion to the contrary (R. 344-357). This opinion their petition reiterates, despite the fact that it is not informed, whereas the Record contains testimony supported throughout by detailed and authentic data and the experience of experts well qualified in the radiator industry (R. 219, 220, 221; 334-339, 340, 341, 347; 381-390). But having heard all of the testimony, the District Court still took under advisement the entry of a decree of sale and only after three months of further deliberation, on May 31, 1932, entered the decree of sale and rendered the opinion subsequently made the basis of appeals to the Circuit Court of Appeals (R. 416, 420). The opinion of the Circuit Court of Appeals states:

> "We have at much labor studied and absorbed this record. A recital of the mass of facts and figures would add nothing to the decision of the case. It will be sufficient to say that, notwithstanding what on first view is a startling disparity between book values and market values, we cannot find on the evidence that the learned judge erred in naming the price in the order of sale. If the upset price of $2,500,000 reflected the fair market value of the assets, we cannot find on the assignment charging error in confirming the sale that the purchase price of $2,550,000 was inadequate. At this figure, the purchase price was two per cent. above the upset price and ten per cent. above the highest price the evidence indicated as likely to be realized in liquidation."

The sale itself was not perfunctory. It was advertised in conformity with the governing statute and widely — once a week for four successive weeks prior to such sale in eleven newspapers in as many cities (R. 545). Statements of the

receivers filed (R. 6) pursuant to Section 5[illegible] the final decree of sale (R. 464) listed the assets and liabilities of the debtor. A public sale was duly held August 8, 1932, and was reported by the receivers (R. 544).

The advertisement of the sale contained notice of the hearing on confirmation of sale to be held on August 18, 1932 (R. 472-484). At such hearing, counsel for both petitioners were present and again cross-examined witnesses throughout two days, but again offered no testimony, either of how the debtor's property could be better disposed of, than through acceptance of the Reorganization Committee's bid, or why that bid was not fair (R. 579, et seq.).

> "Upon consideration of the testimony offered at such hearing," Judge Gibson's subsequently filed Memorandum states (R. 692), "we have not been led to a change of opinion in respect to the good faith of the reorganization scheme, and the power and duty of the Court to approve it, as expressed in a prior opinion under this number, and also in opinion in the case of Lily Clapier *v.* Rudolph B. Flershem, et al., and National Radiator Corporation, at No. 2597 In Equity."

Of the purchase price of $2,550,000, $300,000 was required to be paid at once in cash (R. 699), to cover not only the receivers' obligations and expenses and allowances, but also the entire distributive dividend of "non-assenting creditors" (R. 456-458). Obviously, a substantial portion of this fund will be disbursed in payment of the distributive dividend (of about 20 cents on the dollar) to the "non-assenting creditors". The amount of administrative allowances has never been considered by the District Court.

II. The Reorganization Plan is fair and equitable.

The purpose of the Reorganization Plan was to preserve the "going value" of the debtor corporation and to liquidate, in the only practical way possible under prevailing economic conditions, the plants and other assets of the debtor corporation, for which there is no ready market (R. 53). In formulating this Plan, the Reorganization Committee sought to afford fair and equitable treatment to all classes of securityholders, without regard to any particular "interests" (R. 629). Of the Reorganization Committee, Mr. Flershem was formerly a Vice-President of American Radiator Company in charge of sales and is now Vice-President of The Marine Trust Company of Buffalo in charge of its industrial credits (R. 334), for which reasons he was asked to serve in an advisory capacity as chairman of the executive committee of the debtor corporation; Mr. Cornell is President of Cornell, Linder & Co., engineers making a specialty of assisting in corporate reorganizations (R. 624); Mr. Cahn is a member of the Baltimore banking firm bearing his name (R. 178); Mr. Waters alone has an active connection with the debtor corporation, having been president prior to 1927 of one of its constituent companies and having consented to resume the presidency in February 1930 (R. 371). In short, the Reorganization Committee had nothing whatever to do with any "representations" as to the 1927 value of the debtor's assets.

The Reorganization Plan is fundamentally a general creditors' plan, allotting to Debentureholders all of the senior securities of the New Company and approximately 78% of its common stock (R. 528). In other words, it pre-

serves the priority of the Debentureholders 100% and still gives them over three-fourths of the equity. The capitalization of the New Company (R. 56) so proposed comprises $5,358,000 of new Income Debentures presently issuable (for 50% of the principal amount of the outstanding Debentures), preferred stock without par value (issuable for the remaining 50% of the indebtedness represented by such outstanding Debentures) and common stock without par value, of which approximately 78% is issuable to Debentureholders and the remainder to the debtor's preferred stockholders, with 272,966 unissued shares reserved against the exercise of option warrants next mentioned (R. 56). To the debtor's common stockholders the Plan extends the right to obtain upon the payment of $1 these warrants, granting a right to subscribe for 1 share of new common stock in respect of each 3 shares of present holdings, at a subscription price of $20 for each share of such new common stock (R. 61). This $20 payment fixes no present valuation upon such new common stock, however, and, as all the shares of the New Company will be *without par value*, the value of its assets, as disclosed by its capital structure, is not $16,000,000, but whatever principal amount of its Income Debentures may be issued (to mature in 1946), plus such amounts as may be properly allotted to such no par value stock. The petitioners' assertion of a higher valuation for the debtor's property than the market value of the New Company's securities is scarcely defensible. It resembles their earlier insistence that the "upset price" be based upon the appraisal of replacement costs of the debtor's plants at December 31, 1926 (R. 368), of which the District Court said (R. 418):

"This appraisal is of little value in the determination of liquidation value at present, when only two of the eight plants in the combination are operating, and those two not fully. The intervening defendant has introduced no witness to contradict the witnesses of the plaintiffs who have testified as to present liquidating values. Its claim is so plainly extravagant as to make it worthy of little consideration."

The Reorganization Plan accords the $60,000 of Notes of the International Heater Company (which, by the way, were given for stock in a subsidiary (R. 587)) the same treatment provided for the outstanding unsecured Debentures (R. 66, 645). Other than such Debentures and Notes, the debtor had comparatively few obligations (R. 416), all of small amount and these, to the extent incurred for taxes, wages, services and merchandise, the Plan provided should be assumed by the New Company (R. 56). None of these claims has in fact been paid, but, to the extent that they are, will be without expense to non-participants in the Plan. Certain items of taxes and wages were preferred claims. The amount due for salaries for services is negligible (R. 689). The claims for merchandise amount to only $40,075.15 (R. 691) and were in number 396 (R. 686), all open accounts of comparatively small amounts averaging about $100 each. Under such circumstances, the Reorganization Committee considered it wise to preserve good credit relations with merchandise creditors and that it would enhance the good will of the New Company were merchandise claims paid in full. Moreover, the expense and labor of issuing new securities for so many small claims was wholly disproportionate to their total amount. The provision referred to was dictated therefore by sound business considerations

and plain common sense. Such considerations are not applicable to the claim of International Heater Company, whose position as a general creditor does not differ from that of all the Debentureholders.

The Reorganization Committee are or represent investors in the debtor's securities equal in every respect, or perhaps of superior rank (vide R. 143, 594, 650), to the petitioners' claims. To the petitioners the Plan offers the same opportunity, which has been accepted by more than 95% of the creditors, to participate in the reorganization thereby proposed. The minor equity interest accorded preferred stockholders certainly violates no principle of the *Boyd* case. This Court has often recognized the practical wisdom of continuing existing interests of securityholders, provided the relative positions of the various securities are not inequitably disturbed.

> *Louisville Trust Co.* v. *Louisville, etc., Ry. Co.* (1899), 174 U. S. 674, at 682;
>
> *Northern Pacific Ry. Co.* v. *Boyd* (1913), 228 U. S. 482, at 508;
>
> *Kansas City Terminal Ry. Co.* v. *Central Union Trust Co.* (1926), 271 U. S. 445, at 453.

As there has been no agreement between any class of senior securityholders and stockholders to preserve the rights of both at the expense of unsecured creditors, the "collusion" complained of in the *Louisville Trust Company* case is not present. In the instant case, the Reorganization Plan has been carefully and equitably designed, as Mr. Justice Brewer counselled, so as not to "recognize and preserve any interest in the stockholders without also recog-

nizing and preserving the interests, not merely of the mortgagee, but of every creditor of the corporation".

Louisville Trust Co. v. *Louisville, etc., Ry. Co.* (1899), 174 U. S. 674, at 683.

In the instant case the Circuit Court of Appeals has stated its opinion,

> "which is in complete accord with the findings of the learned trial judge, that while the evidence shows consultation and co-operation between these several parties in formulating the plan it does not disclose collusion or fraud."

III: The District Court had jurisdiction to execute the decree of sale and to confirm the sale had thereunder.

From the decree of sale the petitioners appealed July 23, 1932 (R. 490). The sale was held August 8 (R: 550), was reported by the receivers to the District Court, where it was again vigorously attacked by the petitioners at the hearing of August 18 (R. 579) and was confirmed September 8, 1932 (R. 692). From this confirmatory decree an appeal was taken September 30, 1932 (R. 712).

On September 13, the petitioners moved the District Court for a stay of execution of the two decrees (R. 710), and made like motion in the Circuit Court of Appeals on September 15, 1932. Both motions were denied, on failure of the petitioners to furnish a supersedeas bond. *But jurisdiction by the District Court over the debtor's property had been retained by the District Court* by Section 19 of the confirmatory decree (R. 701) and the subject-matter of this litigation remains intact. Under such circumstances, the

pendency of the petitioners' appeal from the decree of sale, in the absence of the supersedeas bond, which they refused to furnish, did not preclude the confirmation of the sale.

Lesamis v. *Greenberg* (C. C. A. 9th Cir., 1915), 225 Fed. 449.

In that case, at page 453 of the Reporter, it was said:

> "The Revised Statutes of the United States (Section 1001) provide for supersedeas, and the manner in which it may be obtained. Otherwise the courts will not ordinarily stay execution or postpone sales pending hearing on appeal."

In the cases cited below, United States Courts also proceeded with a sale and confirmation thereof, notwithstanding the pendency of appeals.

Hovey v. *McDonald* (1883), 109 U. S. 150.

Davis v. *Mercantile Trust Co.* (1894), 152 U. S. 590.

Duncan v. *Atlantic M. & O. Ry. Co.* (E. D. Va., 1880), 88 Fed. 840.

Gay v. *Hudson River Electric Power Co.* (N. D. N. Y., 1911), 190 Fed. 812.

Lesamis v. *Greenberg* (C. C. A. 9th Cir., 1915), 225 Fed. 449.

The Midland Terminal Ry. Co. case referred to by the petitioners was one where *the supersedeas bond had been tendered and approved and filed.* In the absence of some such restraint, there has obviously been not even that "technical contempt" implied by the petitioners' citation of the *Merrimack River Savings Bank* case.

The Circuit Court of Appeals (after full examination of the Record), in its opinion of March 24, 1933, to each of the questions proposed by the petitioners answered "no" and thereupon affirmed in all respects all orders and decrees of the District Court. This opinion, sustaining in every respect the findings of fact and adjudications of the District Court, discloses no substantial error in the instant case and the respondents respectfully submit that this opinion and the Record show a correct and equitable application of the principles well settled by previous decisions of this Court.

CONCLUSION.

The petition for a writ of certiorari should be dismissed with costs.

Respectfully submitted,

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